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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GOOGLE DIGITAL
ADVERTISING ANTITRUST
LITIGATION

21 md 3010 (PKC)

Conference

New York, N.Y.
February 22, 2023
11:00 a.m.

Before:

HON. P. KEVIN CASTEL,

District Judge

APPEARANCES

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(Case called)

THE DEPUTY CLERK: For the plaintiffs.

MR. BOIES: Good morning, your Honor. David Boies, Boies Schiller and Flexner, representing the plaintiff publisher class.

THE COURT: Good morning.

MR. DEROSE: Good morning, your Honor. Zeke DeRose, Lanier Law Firm, on behalf of the state plaintiffs.

MS. VASH: Good morning, your Honor. Serina Vash, Herman Jones, on behalf of the direct action newspaper plaintiffs.

MR. THORNE: Judge, John Thorne, Kellogg, Hansen, representing plaintiffs.

THE COURT: Anyone else making an appearance?

MR. ELIAS: Good morning, your Honor. Jordan Elias for the advertiser class plaintiffs.

THE DEPUTY CLERK: For the defendants.

MS. SESSIONS: Good morning, your Honor. Justina Sessions, Wilson Sonsini, for Google. I'm joined today by my colleague, Vadim Egoul.

MR. MCCALLUM: Good morning, your Honor. Robert McCallum, Freshfields.

MR. MAHR: Good morning, your Honor. Eric Mahr from Freshfields also.

MS. SUKIENNIK: Good morning, your Honor. Brittany

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1 Sukiennik, Cravath, Swaine & Moore, for Meta joined by my
2 colleague Martha Reiser.

3 THE COURT: Well, I was so looking forward to an
4 erudite discussion of whether MD5 hash values alone are
5 sufficient for deduplication or whether you also need, RD
6 underscore duplicate to accomplish the task. But alas, at
7 11:46 last night, a submission came in.

8 So let me hear first from the plaintiffs on the first
9 point, which arises in paragraph 3(i). And this is the
10 geographic scope of -- I guess paragraph 3 declares what is not
11 reasonably accessible and it declares ad log files concerning
12 ads viewed outside the US, Canada, the UK, Australia and New
13 Zealand to be such ESI that's not reasonably accessible.
14 Google is prepared to add Ireland. And the plaintiffs want the
15 entire European Union, and they want a footnote.

16 So whoever wants to speak for the plaintiffs on this,
17 I'd be happy to hear them. Ms. Vash, are you going to do the
18 honors?

19 MS. VASH: Yes, sir.

20 Judge, with respect to this issue, this is a
21 preservation issue. And your Honor has properly set forth that
22 there's two issues here; whether or not to include the European
23 Union and whether or not to include in the footnote, footnote,
24 plaintiffs' reservation of their rights that this evidence is
25 relevant and that Google should not be permitted to destroy it.

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1 So it's important, Judge, to look at what is an ad log
2 and why do we need it. The ad logs are transaction data. They
3 are the transaction details. They give the publishers,
4 advertisers and their experts visibility into what's happening.
5 The publisher can see exactly what's occurring in the digital
6 ad supply chain.

7 What does that mean? That means they can see how much
8 a bid was, what was the winning bid, what was the losing bid,
9 what was the take rate, what was the fee that each vendor paid,
10 was a cheap programmatic ad for \$5, did that somehow jump over
11 a more expensive \$25 direct ad.

12 THE COURT: And the geographic scope of the carve-out
13 was expanded to include, I think, Daily Mail, was the first to
14 seek an expansion, and it was also expanded because I think of
15 the publishers class action allegations.

16 So really, the question is why the EU and why not Asia
17 and Africa? What is it about the EU that the plaintiffs
18 believe is particularly relevant to this case?

19 MS. VASH: And that's the question, that's a great
20 question. In the first instance, Judge, the first three times
21 we saw this ESI odder, we struck it entirely, and we said there
22 should be no carve-out. We agreed there could be a carve-out
23 if it included these countries other than the European Union,
24 otherwise, there's no reason for that carve-out at all. If
25 it's relevant evidence and it speaks to anticompetitive conduct

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1 and damages, we should be preserving it.

2 THE COURT: Well, that's not entirely true. You
3 subscribe not just to the Sedona principles, but also to
4 Rule 26. So proportionality is front and center here.

5 MS. VASH: Exactly right, Judge. And so let's take a
6 look at some of the anticompetitive conduct that was alleged in
7 the complaint and that survived the motion to dismiss.

8 Specifically, let's take a look at Project Bernanke.
9 I know there's a lot of different project names. I am sure
10 your Honor keeps good track of them. For myself, I call this
11 one skimming the spread. So essentially, Project Bernanke went
12 from a second price auction to a third price auction. That
13 means if there was a \$5 bid and a \$3 bid and \$1 bid, the winner
14 would be the one who bid \$5. The winner would pay the second
15 price, which is the \$3, and the publisher would get a dollar.
16 So there's a spread in there of \$2 that Google was reserving
17 and not paying to publishers, and then taking that pool of
18 money and is subsidizing other Google customers.

19 Now, our plaintiffs need to be able to see the
20 entirety of that transaction. And we believe that some of that
21 occurred in the European Union, pieces of that transaction
22 occurred in the European Union; either the part of it where the
23 auction is being pooled or the part of it where it is later
24 being spent. And we have spoken to Google about the
25 possibility of -- there's three parts in our footnote. One is

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1 that we meet-and-confer -- you preserve it in the first
2 instance; secondly, we meet-and-confer to figure out a sample
3 of what is and is not relevant so that it is not too burdensome
4 with respect to Google; but the third piece of it, Judge, is
5 that the plaintiffs want to reserve their rights so, at the end
6 of the day, if Google destroys it, that we have the right to
7 come back and say, this was relevant in the European Union, we
8 have evidence here that you had evidence to show what happened
9 to this pool of money and now you don't have it because you
10 didn't preserve it.

11 THE COURT: Well, doesn't that undercut all of
12 paragraph 3? Why don't you say that as to everything? The
13 following categories are not reasonably accessible, but you act
14 at your peril if you don't preserve it; how does that
15 accomplish anything?

16 MS. VASH: Well, because, your Honor, we believe
17 that --

18 THE COURT: And why don't you have that as to the
19 other categories of paragraph 3? So you don't reserve rights
20 as to the other categories? You abandon any argument that
21 there was something malicious in their deleting (a) through (h)
22 and (j) and (k)?

23 MS. VASH: No, sir.

24 Google is making a representation that things are or
25 are not reasonably accessible. And on some level, plaintiffs

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1 and the Court have to rely on Google. The Sedona principles,
2 they know what they have, we don't know what they have. They
3 are saying these are the things that are reasonably accessible
4 and these are the things that are not reasonably accessible.
5 And we are agreeing with them as respect certain provisions in
6 paragraph 3.

7 THE COURT: So your reservation in this footnote
8 actually applies to all of paragraph 3 or it only applies to
9 (i)?

10 I mean, are you going to come back in a year and
11 argue, well, voice mail messages were readily accessible and
12 reasonably accessible, and they destroyed them and there should
13 be an adverse inference because they destroyed them?

14 MS. VASH: Judge, under Sedona principle number 7, the
15 requesting party has a burden on a motion to compel to show
16 that the responding party, there are steps to preserve and
17 produce relevant electronically stored information was
18 inadequate.

19 We believe that they need to preserve information in
20 the EU. And yes, as respects information in the EU for Project
21 Bernanke and other anticompetitive conduct and damages, we want
22 to be able at the end of the day to say that they did not take
23 reasonable steps to preserve it. And that's why we're making
24 the record before the Court.

25 THE COURT: That's why I'm saying, what's the

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1 difference between that category, (i), and (a) through (h)?
2 Are you going to argue that? Are you going to come back here
3 in a year and argue that, I've changed my mind, it's not
4 reasonably accessible, I know more now, it never was not
5 reasonably accessible, and therefore, you should draw an
6 adverse inference as to (a) through (h)?

7 MS. VASH: Judge, the ad logs are the heart and soul
8 of the case. The ad logs are the anticompetitive conduct and
9 they demonstrate the damages, and they're necessary here as
10 respects these countries because this is where our plaintiffs
11 do business.

12 THE COURT: And they don't do business in Africa or
13 Asia?

14 MS. VASH: Some of them do, Judge, but this is the
15 heart of the case. And as respects --

16 THE COURT: The European Union is the heart of the
17 case?

18 MS. VASH: The United States is the heart of the case,
19 Judge. But it also is relevant with respect to the European
20 Union, Ireland, New Zealand, Australia, all of these
21 jurisdictions that Google agreed to preserve information in.

22 This is a preservation, your Honor, it's not a
23 production, and this is why we suggest that it's preserved in
24 the first instance, that we meet-and-confer so that Google --
25 Google, who is asking for us operating in the dark -- they have

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1 the information, they want us at this juncture to insulate them
2 from destroying and agree to destroy evidence. And this is not
3 hypothetical, Judge. This has actually happened for some of
4 our plaintiffs sitting here who can speak to it better than I
5 can because they're in the case; Mr. Boies is one of those
6 lawyers, in the *Brown v. Google* case. Google said, this is not
7 reasonably accessible, and so they did not preserve it. And at
8 the end of the day, it was necessary. And they were just
9 sanctioned in the *Brown v. Google* case in California because of
10 it.

11 And we want to be able to be in a position, Judge, to
12 be able to both move to compel and also to demonstrate under
13 Sedona principle number 14, Judge, the breach of the duty to
14 preserve electronically stored information may be addressed by
15 remedial measures, sanctions or both. We believe that the
16 information in the EU, the ad logs for the EU and the ad logs
17 for the jurisdictions that are set forth in 3(i) are relevant
18 to this case, will show anticompetitive conduct, will also show
19 our damages, and therefore, we believe they should be
20 preserved.

21 THE COURT: Thank you.

22 MS. VASH: Thank you.

23 THE COURT: For Google.

24 MS. SESSIONS: Thank you, your Honor.

25 I think your Honor hit the nail on the head here when

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1 you mentioned proportionality. The issue here is
2 proportionality. And what we're trying to do in this part of
3 the ESI stipulation is take certain preservation issues off the
4 table so that we can agree that we're not in fact going to
5 fight about them later and that Google does not need to
6 preserve certain data for the purposes of this case. And so
7 what we're --

8 THE COURT: What's the burden on Google in preserving
9 EU data?

10 MS. SESSIONS: It's a phenomenal amount of data, your
11 Honor. So the data for ad logs, for ads shown in the EU -- and
12 excluding Ireland, because we could agree to Ireland -- is
13 measured in exabytes, which is a term that I actually didn't
14 know until we got into this negotiation, but it is an
15 unbelievable amount of data.

16 THE COURT: I mean, we'll all in this courtroom be
17 dazzled by exabytes. But I'm asking practically speaking,
18 what's the cost to Google?

19 I don't know. And that's really what governs or
20 informs, to a great measure, proportionality.

21 MS. SESSIONS: So some measure of the cost to Google,
22 Google publicly accomplishes the cost of Google cloud storage
23 for companies that want to use Google to store data on the
24 cloud, to store an exabyte of data on Google cloud, it would
25 cost over \$14 million a year to store the data.

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1 THE COURT: But that's what Google charges the rest of
2 the world.

3 MS. SESSIONS: That's right, your Honor.

4 But there's an opportunity cost to storing that data.
5 Because if Google has to make a copy of this data and store it
6 for the purposes of this litigation, that's storage that's not
7 available for other purposes, and it's storage that's not
8 available for Google to charge cloud customers to use it.

9 And your Honor, this volume of data is not usable by
10 the plaintiffs. It would take years to even transfer this
11 volume of data to anyone. So it can't be produced.

12 THE COURT: With all these lawyers here rolling up
13 their sleeves, maybe they could do it a little faster.

14 MS. SESSIONS: Your Honor, the actual computing
15 resources that it takes to transfer this volume of data, our
16 engineers are telling us it really would take years. If you
17 want, your Honor, an exabyte worth of movies would take 2,500
18 years to watch.

19 And your Honor, I have heard no reason why the EU log
20 data is particularly relevant. We kept hearing about damages.
21 Ms. Vash represents newspapers that are located in the United
22 States. The classes in these cases are United States
23 plaintiffs. And the individual plaintiffs are located in the
24 United States.

25 THE COURT: But Ms. Vash made the argument that, yes,

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1 they're in the United States, but some of the auction data
2 could have traveled through the EU and would be located in the
3 EU. That's basically what I heard from Ms. Vash. Is that true
4 or not true?

5 MS. SESSIONS: Frankly, your Honor, I don't really
6 understand that argument. So if the plaintiffs are trying to
7 determine the impact to publishers or advertisers located in
8 the United States or even in the broadest market that they
9 allege, which are limited to the United States, Canada,
10 Australia, they need to look at transactions that occurred with
11 respect to users or advertisers or publishers located in the
12 United States or, at the very broadest, located within their
13 relevant markets. And none of that includes Greece and Latvia
14 and Luxembourg and all of these other countries for which they
15 are insisting that transaction data be preserved.

16 Your Honor, with respect to understanding the workings
17 of the products or how the auction worked, that evidence is
18 located in the documentation and in other places, not in the
19 log data that is being disputed right now.

20 THE COURT: I clearly do not understand -- nor do I
21 need to understand -- how the data travels in real time. But I
22 could imagine that you could have a transaction between a Greek
23 shipping company and an Egyptian shipping company that would be
24 routed through a New York banking institution. So if I was
25 understanding the argument presented by plaintiff, that they

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1 are asserting that that could occur with regard to a US-based
2 transaction, that it somehow is routed through the EU -- I'm
3 going to ask more questions of the plaintiff about that -- but
4 what is your take on that?

5 MS. SESSIONS: So, your Honor, I don't think that the
6 routing of the transactions, which servers it might have hit or
7 something like that, matters for this discussion. Because what
8 we're talking about is the data on, for instance, what a bid
9 might have been, was there a click on the ad that was shown as
10 a result of an impression that was auctioned off. And we've
11 agreed that records relating to ads that were shown to users in
12 the United States and in some of these other jurisdictions
13 would be retained.

14 So all we're talking about now is do we need to
15 preserve records for ads that were shown to a user in Greece,
16 for example.

17 THE COURT: So what you're representing is that Google
18 intends to preserve ad log data for all ads viewed within the
19 United States, Canada, the United Kingdom, Australia, New
20 Zealand and Ireland; is that what you are representing?

21 MS. SESSIONS: The proposal is, yes, that we retain
22 our obligation to preserve records for ads viewed in the United
23 States, Canada, the UK, Australia, New Zealand and Ireland.

24 THE COURT: Regardless of what server they were routed
25 through?

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1 MS. SESSIONS: In my understanding, your Honor, the
2 servers that these things were routed through has no bearing on
3 where the ad was viewed.

4 THE COURT: Listen, you are an attorney. But each
5 side is really making a representation on behalf of their
6 clients. Now, if you want to come back this afternoon or
7 tomorrow morning and say, I overstated the representation,
8 that's a different story. But what I'm asking is: Is Google,
9 the defendant in this case, representing that if the ad was
10 viewed by a user in the United States, Canada, UK, Australia,
11 New Zealand or Ireland that the ad log files will be preserved?

12 MS. SESSIONS: Yes, your Honor. We are willing to
13 preserve the log files for ads viewed by users in those
14 jurisdictions.

15 THE COURT: Listen, there's always some possibility of
16 human error someplace in any human activity. But putting that
17 aside, we're not going to find out a year from now that there
18 were ads or category of ads that were not preserved because
19 unfortunately they were stored in Brussels and that they
20 weren't preserved.

21 MS. SESSIONS: Your Honor, I am unaware of any such
22 issue. I didn't go and investigate the storage location.

23 THE COURT: Right.

24 MS. SESSIONS: Because that's irrelevant to this
25 issue. Because we're talking about where the ads were viewed.

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1 And the relevant markets are defined by where publishers or
2 advertisers are aiming the ads at. The market has been
3 alleged -- that have been alleged by the plaintiffs in this
4 case are either the US -- or the publisher plaintiffs allege an
5 alternative broader market -- and they say that publishers and
6 advertisers want to use products that are geared towards their
7 geographic target audience, which is one reason why their
8 markets are limited to the United States and why it's eminently
9 reasonable to limit preservation obligations to ads viewed in
10 those relevant jurisdictions.

11 THE COURT: Let me hear from Ms. Vash again to expand
12 on what is your concern relative to the EU. Why is the
13 representation made on this record here today now sufficient
14 that Google, the entity, is representing that if the ad was
15 viewed in the listed countries, then the ad log file will be
16 preserved, regardless of whether it was routed through Portugal
17 or Brussels or wherever, why isn't that sufficient?

18 MS. VASH: Thank you.

19 And I will agree -- I think I will agree -- with
20 Ms. Sessions that routing, where it's routed is not necessarily
21 what we're concerned about. What we're concerned about is that
22 the viewing of these ads generates dollars -- as I had said,
23 the \$5, the \$3, the \$1 -- generates dollars and a pool of money
24 that Google keeps and spends elsewhere.

25 THE COURT: I understand that's the allegation.

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1 Now, you maintain, based on that what they do in the
2 EU to consumers in the EU, to advertisers and publishers in the
3 EU, is relevant to this case.

4 MS. VASH: We should be able to see both sides of the
5 transaction. If they pool the money here, we want to follow
6 the money to see where it goes so that we can calculate our
7 damages.

8 THE COURT: Well, how would an ad log help you?

9 MS. VASH: Because the ad logs show us both -- it will
10 enable us to match them up to see where the money came from and
11 how the money was later spent.

12 THE COURT: I understand where the money came from.
13 How does the ad log show you where the money was later spent?

14 MS. VASH: It would enable us to match it up and see
15 how Google subsidized Google customers in making additional
16 bids.

17 THE COURT: Are you talking about subsidizing European
18 customers; is that what you are talking about?

19 MS. VASH: Your Honor has asked what Google's
20 representation would be. We would like to see a representation
21 that the pooled money didn't get spent elsewhere; it got spent
22 here.

23 THE COURT: I assume the pooled money is fungible. I
24 assume pooled money is fungible. That's the way it usually
25 works; right?

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1 MS. VASH: It would assist our experts in determining
2 what those damages are and how it got spent and how the
3 anticompetitive conduct occurred, Judge.

4 THE COURT: I understand the conclusion that it would
5 assist the expert. Money is fungible, and if Google extracted
6 money from your clients in violation of the US antitrust laws,
7 who cares whether they spent it in Europe or not?

8 And how would you trace it? How would you be able to?
9 Because money is fungible, how would you be able to trace
10 from -- you are starting with the ad log from the ad that was
11 viewed in the United States; right? That's what you are
12 starting with, you are looking at that. And you are saying, in
13 this auction, money that you believe should have gone to your
14 clients, the advertiser class, instead went to subsidize
15 somebody else?

16 MS. VASH: Correct.

17 THE COURT: The injury to you is on your not getting
18 that money; right? Isn't that what you claim?

19 MS. VASH: Correct, or on advertisers that they spent
20 too much.

21 THE COURT: Now, whether or not Google dividended that
22 money to its shareholders or bought another corporate jet or
23 built a plant in Europe or subsidized a customer in Europe,
24 what difference does that make to your case?

25 MS. VASH: Judge, at this juncture, when we're talking

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1 about, with respect to this information, preservation, we're
2 asking them to preserve it. We're asking them to preserve the
3 information. And I just want to state, I heard Ms. Sessions
4 say that this is a phenomenal amount of data, and it is. But
5 consider that by 2025, 463 exabytes of data are going to be
6 generated globally daily, daily. So one exabyte is three
7 minutes of data. That's where we're going. Google is a data
8 company. They're the biggest monopoly that this world has ever
9 seen. And we're talking about data in this case. And what we
10 don't want to be in a position, Judge -- and we don't want the
11 Court to be in a position -- is the position that Mr. Boies has
12 in *Brown v. Google* where Google says to the Court, you told us
13 we didn't have to preserve this data; it turns out it's
14 relevant, but you told us we don't have to preserve it. And
15 they pointed to the ESI document saying, plaintiffs said we
16 didn't have to preserve it, the Court said we didn't have to
17 preserve it.

18 THE COURT: So why am I bothering with any of
19 paragraph 3? Your argument proves too much, I guess is what
20 I'm saying. Because if that's true, that would be true for
21 logs of calls made from cellular phones, that would be true for
22 data stored in RAM and temporary files. You could later find
23 out it has gold in there.

24 MS. VASH: Except, your Honor, that as respect to
25 those particular provisions, we're not going to come back.

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1 This is the heart and the soul of our case, the ad log data.
2 And that's why we're here, that's why we focused it here and
3 that's why we're before this court on this particular issue.

4 THE COURT: I'll give you one more shot at how does it
5 matter where the money went. You will be able to determine
6 with some exactitude or your expert will be able to determine
7 how much your damages are. But what does it matter, to use my
8 example, whether Google dividended it to shareholders or bought
9 another company jet or spent it in Europe?

10 MS. VASH: It matters, Judge, because at this
11 juncture, the plaintiffs are being asked to bless the
12 destruction of data and we're operating in the dark at the
13 beginning of a case. And simply, we can't do it and we won't
14 do it. And we'll make the argument -- most respectfully, your
15 Honor -- we'll make the argument, at the end of the day, that
16 we said this data needs to be preserved. And if it's not
17 preserved and it turns out to be critical to this case, we will
18 be making motions for sanctions in this case, very
19 respectfully, Judge.

20 THE COURT: Thank you.

21 MR. BOIES: Your Honor, would you entertain just a
22 thought from second counsel.

23 THE COURT: Well, Ms. Vash did a characteristically
24 excellent job.

25 MR. BOIES: She did.

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1 THE COURT: But if you feel that you want to
2 supplement, I'm not going to stop you.

3 MR. BOIES: She did an excellent job. I really don't
4 have anything to add, except the issue that she raised, which
5 this is right at the beginning. And the footnote that we're
6 talking about says we're going to have a good faith
7 meet-and-confer, we're going to sample the logs, and we're
8 going to decide what's relevant and what's not relevant.

9 If we got from Google a representation that they're
10 going to preserve all of the logs that are in any way relevant
11 to ads that are viewed in the United States, that would be
12 sufficient.

13 THE COURT: How do you do that? We could write a book
14 on relevance as it relates to this case.

15 MR. BOIES: The problem is they know and we don't, at
16 this stage, what those logs show. We haven't had the 30(b)(6)
17 deposition of them, we haven't even had the meet-and-confer, we
18 haven't had the samples. We're operating in the dark. And
19 I've just been through this in the *Brown* case.

20 THE COURT: Well, in the meet-and-confers -- now, this
21 has been going on a long time; I can't tell you how long -- how
22 long has the negotiation of the ESI order been going on?

23 MR. BOIES: Weeks, your Honor, months.

24 THE COURT: I think it goes back to an earlier point
25 in time.

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Ms. Sessions, do you want to enlighten us?

MS. SESSIONS: Your Honor, it goes back to at least April, because it took seven months for the plaintiffs to even send us the first draft.

THE COURT: Now, here's the problem, Ms. Sessions, you're on your feet, so you're going to get another question.

So why haven't you come forward with a sample of the ad logs saying, look, this is what the ad log data looks like, this is why it's not going to make any difference to you?

MS. SESSIONS: Your Honor, two reasons. First, we only recently received requests for production from the plaintiffs. Despite your Honor suggesting that they might want to get to work on drafting requests for production early in the case, they waited until the last day to everybody us with their requests for production. And so that's the first time that we've heard from them about the data that they want Google to produce. And we will have a discussion with them about the data that they want and what we can reasonably provide. And as a part of that, we will have a discussion about what, if any, log level data is usable or appropriate.

The second reason why we haven't just provided a sample of the ad log data is that the data itself is not comprehensible or usable for the plaintiffs. The ad logs are not --

THE COURT: But that's the very reason why you would

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1 show them a sample.

2 MS. SESSIONS: Your Honor, we provided, during the
3 Department of Justice's pre-suit investigation, before the suit
4 that they recently filed, we provided them with one week of log
5 level data from Google ad manager. And we are prepared to
6 provide that same data to the plaintiffs here. But even that
7 data, your Honor, that's not just dumping the logs into a
8 spreadsheet. That took months and months and months of
9 programming and extraction on Google's part to make that data
10 comprehensible to anyone. Because these logs are not just sort
11 of sitting around and somebody goes and looks at them at
12 Google. It's sort of raw, underlying data that feeds up into
13 other systems or aggregations that actually make it usable. So
14 respectfully, a sample of the ad log data is actually just
15 going to create more questions than it would answer because no
16 one is going to understand what it means. It needs to be
17 processed and it needs to be extracted in order to be
18 comprehensible at all. But your Honor, they will get the one
19 week of data. Which for one week of the US transaction level
20 data was 24 terabytes itself and took days to even transfer
21 because the volume of that data was so great.

22 THE COURT: In other words, from the unreadable raw
23 data to something comprehensible by a user?

24 MS. SESSIONS: No, your Honor. To take the raw data
25 and make it into data that was usable and that the Department

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1 of Justice could understand, that took many, many months of
2 programming by Google, because Google had to write custom
3 programs to extract and join up that data. And then it had to
4 be checked and validated. And then every time there was a bug,
5 we had to redo it.

6 When I said transferred, I meant just the extracted
7 data that we worked hard to get. It's so voluminous that it
8 took days to just get it onto the hard drives to be able to get
9 it over to DOJ. So even the one week is not at all a trivial
10 amount of data, which is why we are trying to get some clarity
11 on just not having to preserve this data for countries in the
12 EU outside of Ireland.

13 THE COURT: I understand.

14 Let's turn our attention to DOC LINK and appendix J.
15 Who is going to tee up that issue for the plaintiffs?

16 MR. BOIES: Ms. Vash will.

17 THE COURT: Okay.

18 MS. VASH: Thank you, Judge.

19 So our second issue is a production issue.
20 Plaintiffs' position is reasonable, and there's very little
21 burden on Google, and I hope this will be a lot shorter.

22 We have confirmed, Google has confirmed that they have
23 a tool, an automated tool for identifying links, searching for
24 and producing documents associated with those links. So
25 plaintiffs are suggesting that Google use -- it's an automated

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1 tool -- and produce to us linked documents that are relevant
2 and responsive, and then make available reasonably and
3 proportionate, we would request -- if we found a link that we
4 wanted in documents that have already been produced, documents
5 where the link tool didn't work, we would make a reasonable and
6 proportionate request for that.

7 THE COURT: Just help me out, before I hear more,
8 because I'm a little lost.

9 So DOC LINK is part of the metadata that exists with
10 respect to a document?

11 MS. VASH: Yes.

12 THE COURT: In its native condition, there is the DOC
13 LINK included in the metadata, and so you are not asking Google
14 to create anything; is that right? You are just asking if the
15 document has DOC LINK data, DOC LINK metadata that it be
16 produced, that it not be extracted from the document?

17 MS. VASH: That's right, Judge. And also links,
18 Judge, are like attachments. And if there's an attachment, we
19 need to match the original document with the attachment that is
20 relevant to the production.

21 THE COURT: Is that what they are, attachments? Is
22 that what we're talking about, or are we talking about URLs or
23 are we talking about some other kind of link between documents?
24 That's what I don't have an understanding of.

25 MS. VASH: We're talking, essentially, Judge, if I

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1 send you a document, and I send a PDF --

2 THE COURT: Attached.

3 MS. VASH: -- I have now attached. If I insert a
4 link, I've attached sort of the digital document.

5 THE COURT: Well, how is that different than attaching
6 the PDF?

7 MS. VASH: We think it's not, Judge. And we think,
8 since Google has a tool to find those links and search for --
9 to identify links, search for them and produce those documents,
10 to the extent they have a tool and it's easy for them, they
11 should do that.

12 THE COURT: Now, this is a comprehension issue for me.
13 Does that literally apply to your example of the PDF or would
14 that be something different? Would the metadata on a
15 document -- maybe an email -- be the DOC LINK that you refer to
16 on page 19 that would identify the Adobe PDF?

17 MS. VASH: I believe it is, Judge. And I would invite
18 any of the plaintiffs lawyers to correct me if I'm not right
19 about that.

20 THE COURT: So you are saying that you need the
21 wherewithal to know what the attachment to a document is?

22 MS. VASH: Yes.

23 THE COURT: And that without this, you don't know what
24 the attachment to a document is?

25 MS. VASH: That's right.

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1 And I have a good example, if your Honor doesn't mind.

2 THE COURT: Sure, go ahead.

3 MS. VASH: So by way of example, Google rolls out a
4 new product that plaintiff alleges is created for
5 anticompetitive purposes and carried out in an anticompetitive
6 manner. And Google says, no, it's not anticompetitive, it
7 helps with latency, it helps with how quickly the customer gets
8 the website, what he's looking for. And so the document that
9 rolls out this new program internally links to what's called a
10 latency review and a latency policy team and the latency team's
11 notes. And so we want to be able to get those links and see --

12 THE COURT: Well, that doesn't sound like an
13 attachment.

14 MS. VASH: That's a link, Judge.

15 THE COURT: It doesn't sound like an attachment. It
16 does not sound as if, to me, based on the description, if I am
17 sending you an email with an Adobe PDF attached, I want you to
18 have that Adobe PDF, that's what I want you to have. If there
19 is metadata that can categorize Castel to Vash emails, it's
20 capable of doing that, I would not call that an attachment; I
21 would call that some kind of a search task or all documents
22 written by some task force or group within Google. That's not
23 anything like an attachment.

24 MS. VASH: So in my example, your Honor, these notes,
25 this policy review, this survey, these are in fact linked in

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1 the documents. Like we're going to roll it out, here's the
2 link that shows what it says about latency, here's the link
3 that is our notes from the prior --

4 THE COURT: So there's like a hyperlink?

5 MS. VASH: It's a hyperlink, Judge, exactly.

6 THE COURT: From a document to another document?

7 MS. VASH: Yes, sir. To a digital document.

8 THE COURT: So this was intentionally put into the
9 document --

10 MS. VASH: Yes, sir.

11 THE COURT: -- by the author of the document so that
12 the reader of the document could make sense of the document by
13 looking at the policy or other document to which the main
14 document refers?

15 MS. VASH: Exactly. And it was important enough to
16 the writer of the email to include the link, essentially,
17 Judge, in lieu of a PDF attachment, because this is Google.

18 THE COURT: That's fine. Now I understand that.

19 Let me hear from Ms. Sessions. Is that what we're
20 talking about with regard to DOC LINK?

21 MS. SESSIONS: I don't think so, your Honor. So I
22 want to clarify.

23 So attachments, an attachment to an email, if I send
24 an email and I attach a PDF to it, I would call that an
25 attachment. We have agreed to produce attachments to relevant,

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1 responsive emails and we have agreed to produce metadata that
2 provides correspondence between a parent email and its
3 attachments. There are metadata fields agreed to called
4 attachment name and attachment ID. The DOC LINK --

5 THE COURT: I think I understood from -- my initial
6 understanding was we were talking about attachments. That, I
7 think, was corrected by Ms. Vash, and what she's talking about
8 are hyperlinks to other documents.

9 MS. SESSIONS: Right. And so --

10 THE COURT: Is that what we're talking about?

11 MS. SESSIONS: The dispute is over a subset of
12 hyperlinked documents.

13 So I think it might help, first, for me to clarify the
14 record on the tool at issue and then talk about exactly what
15 plaintiffs are asking. So the tool that plaintiffs identified,
16 the tool can identify emails that have hyperlinks in them. The
17 tool cannot automatically go out and then find all of those
18 hyperlinks.

19 THE COURT: Back that up again. Just repeat it.

20 MS. SESSIONS: So there is a tool that can essentially
21 scan through emails and attempt to identify when there are
22 hyperlinks embedded in an email. And that's what the tool
23 does.

24 Then what plaintiffs are asking is for Google to then
25 go out and manually find every single one of those hyperlinked

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1 documents that's hyperlinked in an email. The tool doesn't go
2 out and automatically find them; somebody has to go and follow
3 the link, see where it goes and pull in the document. And
4 then, your Honor --

5 THE COURT: Are you in any way objecting to producing
6 the hyperlinked document to a document that you concede is
7 otherwise relevant? If the main document is relevant, are you
8 objecting to the production of the hyperlinked document?

9 MS. SESSIONS: In the case, your Honor, where the
10 hyperlinked document is not otherwise in our database or pulled
11 in by the searches that we're doing.

12 So for context, right, Google has already produced
13 over 2 million documents in this case, and we expect that we're
14 going to end up producing a fair amount more as we
15 meet-and-confer with the plaintiffs about their requests for
16 production. We're going to agree on custodians, and we're
17 going to agree on search terms. And we're going to search the
18 custodians' custodial files that hit on the search terms, and
19 then we'll review those for responsiveness.

20 So if a hyperlinked document is in someone's custodial
21 file and hits on the search terms, then that is going to get
22 produced. What the plaintiffs are asking --

23 THE COURT: My question is directed to something else.

24 You do not have a principled objection on any ground
25 to producing a nonprivileged, non-work product hyperlinked

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1 document that is referred to in a document that you otherwise
2 concede is relevant?

3 MS. SESSIONS: The objection, your Honor, is to adding
4 to our burden by forcing us to go out --

5 THE COURT: It's the searching for the --

6 MS. SESSIONS: It's the searching for them and then
7 reviewing them, because we're only talking about documents that
8 are otherwise outside of the agreed upon review population. So
9 we're talking about the case where the hyperlinked document is
10 not in someone's custodial file and doesn't hit on the search
11 terms. So it's pretty unlikely to be relevant. And what
12 plaintiffs are asking us to do --

13 THE COURT: If I come to you and I say, I have this
14 document and on page 36 there's a hyperlink to the manual on
15 such and such and we have searched, we don't have that, what
16 happens then?

17 MS. SESSIONS: We have agreed to meet-and-confer and
18 entertain requests for hyperlinked documents. So if the
19 plaintiffs say, we have this email, we can't find these links,
20 these links are really important, can you, Google, go out and
21 get them. If there's a reasonable number of those requests and
22 they're relevant and proportional, we have agreed from day one
23 to do that.

24 What we are objecting to --

25 THE COURT: But are you going to turn around and say,

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1 why do you need that, why do you want that, or are you just
2 going to --

3 MS. SESSIONS: Your Honor --

4 THE COURT: What's the argument?

5 MS. SESSIONS: Your Honor, if it's a reasonable number
6 of them, then we'll give them to the plaintiffs.

7 What we're objecting to is a process by which we have
8 to automatically and proactively go out, reach beyond the
9 database and go get documents that are otherwise outside of the
10 review population and add those to our review simply because
11 they were hyperlinked. If they want to ask us for specific
12 links, we're of course willing to do that. But what we're
13 objecting to is some unknown expansion of the review that we
14 already have to do.

15 THE COURT: Well, the unknown expansion is an
16 interesting point. It would seem to me that there's a way to
17 test it. And again, it's a catch-22 for you because if you
18 take -- I don't know what a good number here would be -- a
19 million documents, which sounds like a really small number
20 here, okay, that's why I used a million, and you searched them
21 for hyperlinks and you found out that only four of them have
22 hyperlinks, well, it kind of undermines your burden argument.
23 And if you found out that 500,000 of them had hyperlinks, it
24 enhances the plaintiffs' argument why they need it. If the
25 document was relevant, why isn't it really effectively the same

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1 as being part of the document that was produced as relevant?

2 MS. SESSIONS: Your Honor, I think, given the scope of
3 the review that we're being asked to do, chances are the
4 relevant documents are going to be pulled in in the document
5 review. And everybody knows that the relevant documents in a
6 case are not the full 2 million that we've produced or however
7 many million more that we produce.

8 THE COURT: Right.

9 MS. SESSIONS: So if there are a couple of links that
10 the plaintiffs need, we can work that out and we can talk about
11 it. But it's just adding documents that are not presumed to be
12 relevant or responsive because they're not in a custodial file
13 and they don't hit on search terms and just adding that onto
14 the review population simply because they were hyperlinked.

15 THE COURT: Listen, I realize that until quite
16 recently there were more issues at stake than there are at this
17 moment. So I don't mean to be too critical with this
18 observation. I realize your first and the foremost answer is
19 yesterday there was 20 issues; now there are 2. But it would
20 seem to me that having an example to give to the plaintiff and
21 therefore an example to give to the judge would be more
22 persuasive. So there are a lot of hyperlinks in documents or
23 they're rare occurrences. The hyperlinked documents are
24 largely in the 2 million produced or they're not largely in the
25 2 million produced.

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1 I'm the person who is most in the dark, the plaintiffs
2 are next in line, you may personally be not informed on that
3 issue, but you can get to that. That would seem to me to be a
4 way that I would go about trying to break the tie on this, so
5 to speak.

6 MS. SESSIONS: Well, your Honor, I appreciate that you
7 are in the dark about this. I would submit the plaintiffs are
8 not in the dark about this, because they have our document
9 production of the 2 million documents, and so they can also
10 examine that for themselves. I mean, I can't prove a negative,
11 I can't tell you that there isn't a relevant document sitting
12 outside that population, but 2 million is pretty good and --

13 THE COURT: But I guess what I'm getting at is:
14 Wouldn't it be great if the judge knew, we did a sampling -- we
15 didn't do it for all 2 million documents -- and 5 percent of
16 the documents have a link, 20 percent of the documents have a
17 link, 50 percent of the documents have a link in that sample,
18 and then, we check to see whether the linked documents in that
19 sample were in the universe of previously produced documents,
20 and we found out that 87.3 percent of them were and 13 percent
21 were not. And if this comes up, we'll get them their
22 13 percent. This whole thing would go more smoothly if we had
23 that kind of information.

24 MS. SESSIONS: Your Honor, we would be happy to
25 meet-and-confer with the plaintiffs about that. And our offer,

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1 which we made at the beginning, still stands, which is we are
2 always willing to entertain reasonable requests for linked
3 documents. But with your Honor's guidance, I think we could go
4 back, and we would be happy to try to do some of that sampling
5 and see if we can't work this out with the plaintiffs.

6 THE COURT: Ms. Vash.

7 MS. VASH: Thank you, Judge.

8 I think, fundamentally, we disagree on whether the
9 linked documents are relevant and should be produced in the
10 first instance. And your Honor hit right on that, when you
11 said, why isn't this effectively -- I'm paraphrasing, Judge --
12 why isn't this effectively the same as being part of the
13 document review in the first instance; we agree.

14 And I think an easy way to do the sampling is to run
15 the tool on the 2 million documents -- they have the tool --
16 run the tool on the documents and see how many of those hit
17 upon linked documents.

18 THE COURT: No, that's the relief you want in the
19 order.

20 MS. VASH: Or on some sample of it, your Honor.

21 THE COURT: So this is what I'm going to do. I'm
22 going to do nothing for 14 days and encourage a further
23 meet-and-confer. And then if it results in nothing, I have the
24 order that was transmitted last night, I have it in Microsoft
25 Word, and I'll issue it. I'll issue it. Somebody will win;

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1 somebody will lose. Or maybe you'll both win or both lose,
2 depending on what language I put in. That's the danger when
3 you kick these to the judge. And I don't say that that the
4 judge is trying to scheme something up, but it's why it was
5 wise of the parties to resolve what you could resolve, because
6 it doesn't necessarily mean that you're going to get a
7 desirable result out of the judge. So I try to work hard on
8 these things, but you are better off trying to negotiate this
9 out.

10 So how does that sound to the plaintiffs?

11 MR. BOIES: Yes, your Honor.

12 MS. VASH: Thank you, Judge. That sounds good.

13 THE COURT: Ms. Sessions, how does that sound?

14 MS. SESSIONS: Very good, your Honor. Thank you.

15 THE COURT: Wonderful. Thank you all for being here.

16 And unless there's something else, we're adjourned.

17 (Adjourned)